

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL
RECEIVED
JAN 14 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules Regarding Installment Payment)
Financing For Personal Communications)
Service (PCS) Licensees)

WT Docket No. 97-82

To: The Commission

**REPLY COMMENTS OF
THE TELECOMMUNICATIONS ADVOCACY PROJECT
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

The Telecommunications Advocacy Project ("TAP"), by its attorneys, pursuant to Section 1.429(g) of the Commission's Rules, hereby submits these Reply Comments in Response to Oppositions to Petitions for Reconsideration that were filed in the above-referenced proceeding.^{1/} Various petitioners have asserted that the Commission's PCS C-Block relief efforts, as set forth in the Restructuring Order, do not go far enough.^{2/} Others have opposed providing special relief to delinquent licensees because any such relief would penalize those C-Block licensees who adhered to the Commission's original payment deadlines and would introduce new incentives that were not originally contemplated.^{3/}

^{1/} In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order, FCC 97-3342, 62 Fed. Reg. 55375 (Oct. 24, 1997) (hereinafter "Restructuring Order").

^{2/} See, e.g., Petition for Reconsideration of Alpine PCS, Inc., WT Docket No. 97-82, Nov. 24, 1997, at 1 ("[T]he Commission's response to the C block's financial pain is ineffective.").

^{3/} Compare Petition for Reconsideration of Cook Inlet Region, Inc., WT Docket No. 97-82, Nov. 24, 1997, at 2 ("CIRI ... urges the Commission to reinstate and apply its original rules regarding installment payment default and delinquency."), with, Petition for Reconsideration and Clarification of Omnipoint Corporation, WT Docket No. 97-82, Nov. 24, 1997, at 3 (hereinafter "Omnipoint Petition") ("At a minimum, the Commission should modify and clarify the [Restructuring Order] ... to ensure that its relief mechanisms are not themselves the cause of further (Cont'd on next page)

In response to these differing opinions, TAP recommends that the Commission adopt a modified approach allowing C-Block licensees to utilize tax certificates. Unlike the alternatives offered by the Commission and proposed by various petitioners, tax certificates have a proven success rate in the marketplace. In contrast, the other alternatives set forth in the Restructuring Order remain untested both legally and as a mechanism for attracting capital.

I. INTRODUCTION

TAP, a District of Columbia corporation, is a non-profit entity that was formed in 1997 to increase small business participation in emerging opportunities within the telecommunications industry. To achieve its objective, TAP is a frequent advocate of small businesses in matters before federal, state and local governments. TAP also teaches organizations and individuals how to become effective advocates; forges coalitions among non-profit grassroots organizations that are interested in participating in new technological opportunities; identifies emerging opportunities in the telecommunications industry and new sources of capital for start-up businesses; and promotes entrepreneurship within historically disadvantaged communities. Furthermore, TAP helps historically disadvantaged entities gain access to the telecommunications marketplace by providing these entities with the technical assistance and advocacy training needed to become effective and informed members of the small business community.

II. ORIGINS OF THE COMMISSION'S TAX CERTIFICATE PROGRAM.

The Commission implemented the tax certificate program in 1943 to facilitate the sale of broadcast stations by licensees affected by the Commission's new limit on the number of radio

(Cont'd from previous page)

business disadvantage to Entrepreneurs (both Block C and Block F) who attempted to bid responsibly and play by the auction rules.”).

stations a licensee could own in the same market.^{4/} In 1978, the Commission extended its tax certificate program in an effort to promote minority ownership of broadcast licenses.^{5/} Under this program, the Commission issued tax certificates pursuant to the Internal Revenue Code, 26 U.S.C. § 1071, to: (1) initial non-controlling investors in minority- and woman-owned applicants upon the sale of their interests; and (2) licensees who assigned or transferred control of their licenses to minority- and/or woman-owned entities. The certificates enabled qualified investors and licensees to defer the gain they realized on their investment in the license when they sold their interest in the license.

The tax certificate program and related Commission policies caused minority ownership of broadcast facilities to increase significantly for the first time in U.S. history.^{6/} Despite the success of the tax certificate program, or perhaps because of it, Congress terminated the program in 1995.^{7/} Congress terminated the program in part because of Viacom's plan to sell its cable systems to a minority-controlled company for \$2.3 billion and thereby defer \$285-\$400 million in capital gains.^{8/} Not everyone -- including the President -- was in favor of eliminating the tax certificate program.^{9/}

^{4/} Lauren Darling, "House Panel Examines Reining In Tax Break for Certain Broadcast Sales," *Taxation, Budget and Accounting*, Jan. 30, 1995, at G-10.

^{5/} See Statement of Policy on Minority Ownership of Broadcast Facilities, Public Notice, 68 FCC 2d 836 (1978).

^{6/} Antoinette Cook Bush and Mark S. Martin, "The FCC's Minority Ownership Policies From Broadcasting to PCS," *Fed. Com. L. J.*, June 1996, at 424.

^{7/} See Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

^{8/} Christopher Stern, "Congressman Spotlights Viacom Tax Deal," *Broadcasting & Cable*, Jan. 23, 1995, at 163.

^{9/} See, e.g., Statement by President William J. Clinton Upon Signing H.R. 831, reprinted in 1995 U.S.C.C.A.N. 89, 134 ("In approving H.R. 831, ... I must note my regret that the bill contains a provision that repeals ... the current tax treatment for the sale or exchange of radio and television broadcast facilities and cable television systems to minority-owned businesses....").

Since Congress repealed the tax certificate program, few minority and women small business entrepreneurs have entered the telecommunications marketplace. At the same time, large companies have consolidated with increasing frequency, creating less diversity among telecommunications companies. A recent report by NTIA states:

The minority owners interviewed contend that the 1996 Act and the FCC's new ownership limits have the potential to translate into even greater economic possibilities for a handful of companies that already were generating high streams of advertising revenues, and to squeeze out smaller stations in weaker markets. Lending some credibility to this claim is the phenomenal growth occurring for companies such as Gulfstar, Clear Channel and Chancellor, and the declining minority ownership numbers, particularly for FM stations.^{10/}

III. THE COMMISSION SHOULD REVITALIZE THE TAX CERTIFICATE PROGRAM FOR C-BLOCK LICENSEES.

The Commission should formulate a solution that all C-Block licensees can utilize to attract investors and thereby acquire the capital needed to fulfill their obligations to the federal government and begin offering a new and competitive service to the public. To that end, TAP strongly encourages the Commission to request Congressional authority to amend its rules and Section 1071 of the IRS Code to give entities that provide investment capital to C-Block licensees with a tax certificate that could be used at the time of divestiture or transfer. This tax certificate would be similar to the tax certificates that were issued by the Commission for broadcast and cable licensees, with one significant difference: all C-Block licensees would be eligible for a tax certificate, regardless of race, sex, or national origin. Specifically, any non-controlling investor in a C-Block licensee would be entitled to receive a tax certificate that would allow the investor to defer indefinitely any gain realized from the sale of its investment. Providing investors with a tax certificate would ensure that the federal government receives the payments owed by C-Block

^{10/} "Minority Commercial Broadcast Ownership in the United States: A Report of the Minority Telecommunications Development Program, Nat'l Telecommunications and Information Administration, The United States Dept. of Commerce," Aug. 1997, at 9.

licensees and would preserve the integrity of the Commission's auction rules without running afoul of Adarand.

A. Providing Investors in C-Block Licenses With a Tax Certificate Would Be the Most Effective Means of Ensuring That the Federal Government Receives the Payments Owed by C-Block Licensees.

The Commission recently adopted several alternative relief measures for C-Block licensees.^{11/} However, parties agree that the relief granted by the FCC does not achieve the objective of increasing the likelihood of full and timely payment of the licensees' auction debt.^{12/} In fact, relief options adopted in the Restructuring Order have yet to cause any C-Block licensee to receive a significant investment from an outside source. Within three months of revitalizing the tax certificate program, however, C-Block licensees would almost certainly receive significant investments in their endeavor.

Revitalizing the tax certificate program would also bridge the gap by providing C-Block licensees with much needed financial support from private industry without further discounts from the Commission. As a result of the infusion of capital, the federal government would likely receive most or all of the money that was bid for the C-Block licenses.

The tax certificate program has a history of success, as demonstrated by Exhibit A hereto. A recent editorial in Broadcasting & Cable calling for reinstatement of the tax certificate confirmed that:

Before 1978, minorities owned 40 out of 8,500 broadcast stations. Tax certificates gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed. During the 15 years of the policy's existence, the issuance of minority tax certificates

^{11/} Restructuring Order, supra note 1.

^{12/} See, e.g., Petition for Reconsideration of Alpine PCS, Inc., supra note 2.

resulted in the acquisition by minorities of 288 radio stations, 43 television stations and 31 cable systems.^{13/}

Repeal of the tax certificate program has created a market entry barrier for minority entrepreneurs. The National Association of Black Owned Broadcasters reported that:

In such a capital-intensive market, procuring investors and raising enough capital to finance broadcast ownership is a woefully hard task for most, especially if one faces institutional discrimination. African American entrepreneurs, in addition to the problems attendant to being small players in the industry, face discrimination in the area most vital to entrepreneurship: capital investment.^{14/}

The Commission and Congress are well aware of the difficulties minority and women small business entrepreneurs face in attracting investment capital.^{15/} To minimize these difficulties, in 1993, Congress instructed the Commission to consider using tax certificates to enable women, minorities and small businesses to participate in spectrum-based services.^{16/} The Commission did adopt rules that would allow broadband PCS licensees to utilize tax certificates. Before the C-Block auction began, however, the Supreme Court issued its decision in Adarand, requiring any race-conscious

^{13/} Erwin G. Krasnow, "A Case For Minority Tax Certificates," *Broadcasting & Cable*, Dec. 15, 1997, at 80.

^{14/} Comments of the National Ass'n of Black Owned Broadcasters in GN Docket No. 96-113, Oct. 15, 1996, at 14.

^{15/} See, e.g., In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5572 (1994) ("[I]n some respects it is necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of personal communications services than is necessary to ensure participation by other designated entities. In particular, we have concluded that steps such as adoption of bidding credits, tax certificates, alternate payment plans and relaxed attribution rules, must be taken to encourage investment in minority and women-owned businesses." (emphasis added) See also, Small Business Credit and Business Opportunity Enhancement Act of 1992, §§ 112(4), 331(a)(4), Pub. Law No. 102-366 (Sep. 4, 1992) (concluding that minorities have "extraordinary" difficulties in obtaining capital); Women's Business Ownership Act, Pub. L. No. 100-533 (1988) (concluding that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital).

^{16/} See 47 U.S.C. § 309(j)(4)(D) (1997).

measures to be narrowly targeted to meet a compelling government interest.^{17/} Consequently, the Commission was forced to abandon its plan to offer tax certificates.^{18/}

**B. Tax Certificates Will Not Cause A
Significantly Negative Impact On the Budget.**

The Commission should review Congressional Budget Office and Office of Management and Budget projections to ascertain the economic implications of implementing a tax certificate program relative to the Budget Act. Any and all projections should factor in the economic gains to be realized from ensuring the viability of PCS licensees by providing tax certificate relief. TAP strongly believes that the short-term cost to the government of allowing tax certificates will not be significant because the certificates will not be used until the PCS licensee transfers the system. By the time any sale takes place, the system's assets will have appreciated substantially and the marketplace will have realized significant taxes from the revenue generated by the system. The new jobs and taxes generated from these systems will likely generate enough capital to significantly offset any capital gain deferments.

**C. Issuing Tax Certificates Would Provide Much Needed Financial
Relief to PCS C-Block Licensees Without Undermining the
Integrity of the Commission's Auction Process.**

The Commission has attempted to relieve C-Block applicants of their obligation to pay the federal government the full amount of their winning PCS bids.^{19/} Many have argued that making any

^{17/} Adarand Constructors, Inc. v. Peña, 113 S. Ct. 2097 (1995). Soon after issuing the Adarand decision, the Supreme Court decided United States v. Virginia, 116 S. Ct. 2264 (1996), holding state-imposed gender classifications unconstitutional absent an "exceedingly persuasive justification" for the classification. Thus, the Commission's "female preferences" were also thrown into doubt.

^{18/} See In the Matter of FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, Report, FCC 97-353 (released Oct. 9, 1997).

^{19/} See Restructuring Order, *supra* note 1.

further concessions to delinquent C-Block licensees will jeopardize the integrity of the Commission's auction process and, in effect, penalize those C-Block licensees who adhered to the Commission's original rules.^{20/} TAP shares these concerns and understands the importance of preserving the integrity of the Commission's auction process.

Revitalizing the tax certificate program would not implicate these concerns. Instead, it would assist all C-Block licensees and, consequently, would neither penalize any C-Block licensees nor compromise the integrity of the Commission's auction process. Furthermore, under TAP's proposal, C-Block licensees would still be eligible for the remedies set forth in the Restructuring Order. Tax certificates would be an additional remedy that C-Block licensees could use, independent of the other remedies contained in the Restructuring Order.

Arguments used to defeat the tax certificate program in the past have no relevance here. For example, opponents often claimed that the program would lead to abuse and shams.^{21/} That fear is unfounded here. The Commission, having already reviewed the licensees' qualifications prior to issuing the licenses, would not need to undergo any additional fact-finding proceeding prior to issuing tax certificates. Control of the licenses would remain in the licensees that have already undergone the Commission's rigorous scrutiny.

^{20/} See, e.g., Omnipoint Petition at 12; Opposition of AirGate Wireless, L.L.C., WT Docket No. 97-82, Dec. 29, 1997, at 1 ("A rescue effort ... is unfair to bidders who complied with the rules and relied on their strict enforcement, and will undermine the integrity of the auction process.") (emphasis in original); Opposition of AT&T Wireless Services Inc. to Petitions for Reconsideration, WT Docket No. 97-82, Dec. 29, 1997, at 3 ("[F]urther revisions to the Commission's rules will only penalize responsible C-block bidders and the rest of the wireless industry....").

^{21/} See S. Rep. No. 104-16 (1995), reprinted in 1995 U.S.C.C.A.N. 89, 98 ("[T]he FCC's standards for issuing tax certificates have been so vague that the program appears to have been subject to significant abuse. ... In addition, because the FCC generally requires only one year of minority ownership or control to qualify for a tax certificate, section 1071 has frequently resulted in only transitory minority ownership of broadcast properties....").

**D. Issuing Tax Certificates to C-Block Licensees
Would Be Consistent With Adarand.**

Adarand requires all race-conscious measures to be narrowly tailored to meet a compelling government interest.^{22/} However, TAP's proposal is not race-conscious. Indeed, minorities would not be the only ones entitled to the tax certificates. Rather, all C-Block licensees would be eligible to participate in the program and any non-controlling C-Block investor would be eligible to receive a tax certificate. Thus, the tax certificates would in no way be based upon an entity's race or ethnic origin. Therefore, the strict scrutiny standard adopted in Adarand would not apply.

**E. There Is Precedent For Issuing Tax
Certificates to PCS Licensees.**

Authorizing tax certificates for PCS licensees is not unprecedented. In 1994, the Commission adopted rules allowing broadband PCS licensees to utilize tax certificates.^{23/} At the same time, the Commission extended eligibility for tax certificates to cellular companies that divested their cellular holdings in order to comply with the Commission's rules governing cellular licensees' participation in the broadband PCS auctions.^{24/} The Commission enabled PCS and cellular licensees to use tax certificates in order to "further implement Congress's goal to facilitate the participation of minorities and women in spectrum-based services."^{25/} However, the Commission was unable to issue any tax certificates under these rules before Congress repealed the tax certificate program.^{26/}

^{22/} Adarand Constructors, Inc. v. Pena, 115 S. Ct. at 2113.

^{23/} In the Matter of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5595 (1994).

^{24/} Id. at 5596-97. The Commission also agreed to issue tax certificates as a way of encouraging fixed microwave operators to voluntarily relocate their systems in order to clear spectrum for PCS licenses. Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

^{25/} Id. at 5597.

^{26/} See Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

A recent letter from the Cellular Telecommunications Industry Association ("CTIA") to the IRS, asking the IRS to clarify certain rules pertaining to eligible tax deductions for cellular carriers, illustrates just how attractive tax incentives are to wireless telecommunications carriers.^{27/} In fact, CTIA estimated that the tax incentive described in their letter could save some carriers millions of dollars.^{28/} Accordingly, there is good reason to believe that investors would be attracted to C-Block licensees if similar tax incentives were available.

IV. CONCLUSION

C-Block licensees are likely to fill niches in the marketplace that large PCS operators overlook.^{29/} Their participation will in turn promote competition and universal service. Consequently, the Commission would serve the public interest by enabling C-Block licensees to attract investors. Offering tax certificates to non-controlling investors in C-Block licensees would provide a proven method of attracting investors. The resulting influx of capital would allow C-Block licensees to provide valuable service to the public and to pay the federal government what they owe.

^{27/} See "Cellular Carriers Ask IRS to Revise Rules On Deducting Marketing Costs," Comm. Daily, Jan. 2, 1998, at 2.

^{28/} Id.

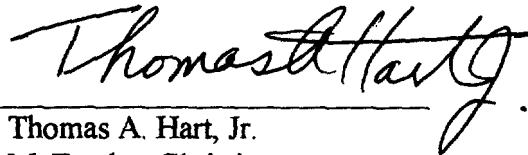
^{29/} See, e.g., In the Matter of FCC Report to Congress on Spectrum Auctions, Report, FCC 97-353 (Oct. 9, 1997), at 23 (reporting that Airadigm Communications, a C-Block licensee, has begun providing service to parts of rural America and to "some of the most underserved Americans by joining into a partnership with the Chillicothe Native American tribe, which plans to provide cutting edge wireless local loop service on the tribe's reservation.").

Wherefore, in light of the foregoing, TAP strongly encourages the Commission to seek Congressional authority to revitalize the tax certificate program as a means of providing C-Block licensees with the ability to attract much needed capital investments.

Respectfully submitted,

TELECOMMUNICATIONS ADVOCACY PROJECT, INC.

By: _____



Thomas A. Hart, Jr.

M. Tamber Christian

Amy E. Weissman

GINSBURG, FELDMAN & BRESS, Chtd.

1250 Connecticut Avenue, N.W.

Washington, D.C. 20036

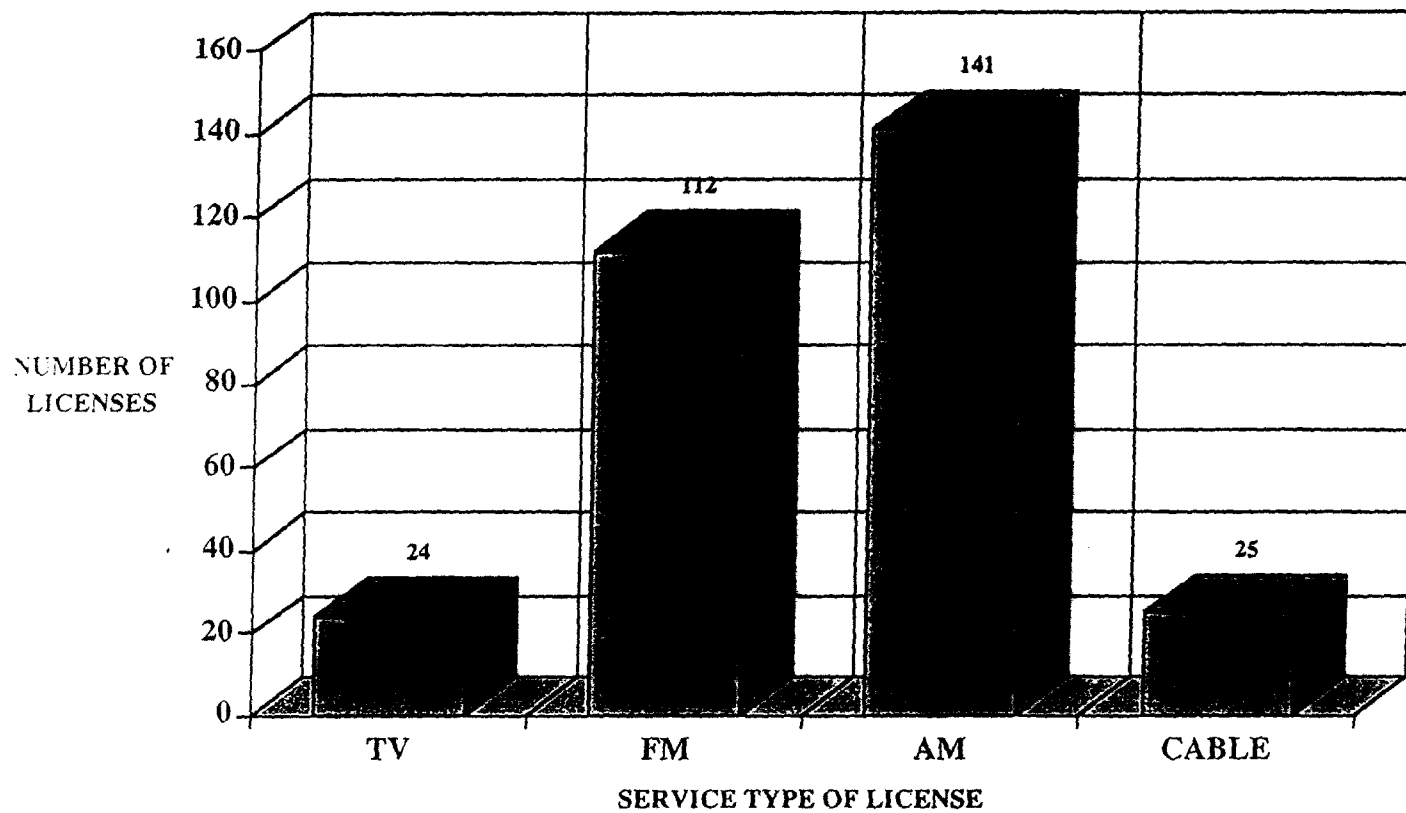
202-637-9000

Its Attorneys

Dated: January 14, 1998

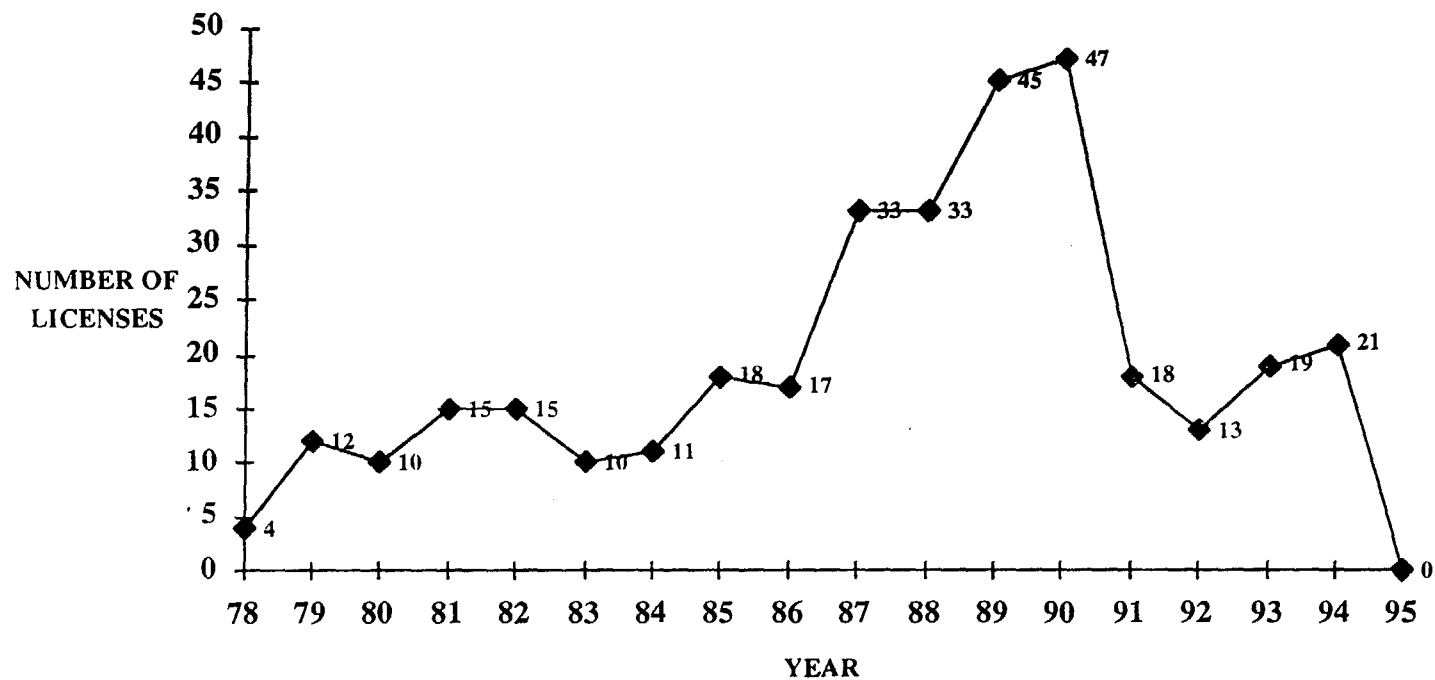
EXHIBIT A

TAX CERTIFICATES 1978 - 95



SOURCE: Von M. Hughes, "A Constitutional and Quantitative Analysis of Federal Communications Commission Minority Preferences," Harvard Law School, John F. Kennedy School of Government, Harvard University.

TAX CERTIFICATES 1978 - 95



SOURCE: Von M. Hughes, "A Constitutional and Quantitative Analysis of Federal Communications Commission Minority Preferences," Harvard Law School, John F. Kennedy School of Government, Harvard University.



Telecommunications Advocacy Project

AFFIDAVIT OF KHALIL MUNIR EXECUTIVE DIRECTOR THE TELECOMMUNICATIONS ADVOCACY PROJECT

I, Khalil Munir, do hereby certify under penalty of perjury that the following statements are true and correct to the best of my information, knowledge and belief

1. I am executive Director of the Telecommunications Advocacy Project (TAP).
2. TAP was formed in September 1997 to increase small business opportunities in the telecommunications industry.
3. TAP achieves its objectives by participating in activities at the local, state and federal level that are aimed at increasing small business opportunities.
4. The foregoing Reply Comments of the Telecommunications Advocacy to Oppositions to Petitions for Reconsideration is the inaugural pleading of TAP before the Federal Communications Commission.
5. I have carefully reviewed, and I hereby subscribe to, the attached Reply Comments of the Telecommunications Advocacy Project to Oppositions to Petitions for Reconsideration. The facts stated therein are true to my personal knowledge except where identified as being based upon other official records or exhibits to the Reply Comments.

By:

Khalil Munir

Date:

1/14/98

Khalil Munir, Executive Director

The Telecommunications Advocacy Project

On this 14th day of January, 1998, before, me, the subscriber, a Notary Public in and for the jurisdiction of the District of Columbia, personally came Khalil Munir known to me to be the individual who executed the foregoing and being duly sworn acknowledged the same to be his free act and deed.

WITNESS my hand and Notarial Seal.

[Signature]
Notary Public

My commission expires: 9/30/00

CERTIFICATE OF SERVICE

I, Barbara Guzzy, do hereby certify that a copy of the foregoing Reply Comments of the Telecommunications Advocacy Project to Petitions to Deny were sent via first-class mail this 14th day of January, 1998, to the following recipients:

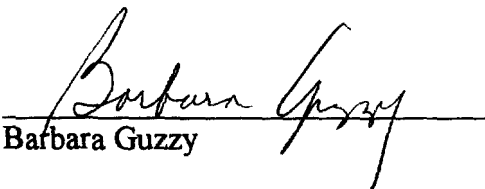
Gerald S. McGowan, Esq.
George L. Lyon, Sr., Esq.
Lukas, McGowan, Nace & Gutierrez, Chtd.
1111 19th Street, NW
12th Floor
Washington, DC 20036

Cathleen A. Massey, Esq.
Douglas I. Brandon, Esq.
AT&T Wireless Services, Inc.
1150 Connecticut Ave., NW
Washington, DC 20036

Joe D. Edge, Esq.
Mark F. Dever, Esq.
Drinker, Biddle & Reath, L.L.P.
901 Fifteenth Street, NW
Suite 900
Washington, DC 20005

Shelley Spencer, Esq.
AirGate Wireless, L.L.C.
6511 Griffith Road
Laytonsville, MD 20882

Mark J. Tauber, Esq.
Mark J. O'Connor, Esq.
Piper & Marbury, L.L.P.
1200 19th Street, NW
7th Floor
Washington, DC 20036


Barbara Guzzy